

WEE SIAW HONG v. LAU SIEW TICK & ANOR.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.J.J.) November 23, 1978]

[Kuching — Federal Court Civil Appeal No. 77 of 1978]

Damages, — Quantum — Fracture of the mandible — Damages awarded too low and increased on appeal.

In this case the appellant aged 5 years had been hit by a car whilst crossing a road. He sustained (a) multiple abrasions on the face, dorsum of right hand and left shin; (b) fracture of the mandible left side; (c) fracture of the left tibia. The learned trial judge awarded \$2,500 general damages. The appellant appealed.

Held, allowing the appeal: having regard to the nature of the injuries, the disabilities, the trend of awards in comparable cases and taking into consideration various factors, the award of \$2,500 was inordinately low and should be increased to \$8,000.

Cases referred to:-

- (1) *Mahammad bin Mahammad Said & Anor. v. Perianayagam & Anor.* [1972] 1 M.L.J. 67, 68.
- (2) *Jag Singh v. Toong Fong Omnibus Co. Ltd.* [1964] M.L.J. 463, 465.
- (3) *Mohamed bin Ahmad Suleimanie v. Gim Guan Co. Ltd.* [1966] 1 M.L.J. xxxiv.
- (4) *M. Alagappan s/o Muthuraman v. Government of the Republic of Singapore & Anor.* [1967] 1 M.L.J. xl.
- (5) *Saniah & Ors. v. Abdul Hamid & Ors.* [1967] 2 M.L.J. 255.
- (6) *Kepong Mines Ltd. & Anor. v. Chee Sing Kau* [1969] 1 M.L.J. 75.

FEDERAL COURT.

M.S. Sandhu for the appellant.

James Ho for the respondent.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): We allowed the appeal against quantum of general damages, interest and costs. We now give our reasons.

On the morning of November 25, 1974 appellant/plaintiff, an infant of about 5 years, was out walking along Pujut/Lutong Road, Miri, with his paternal grandmother on their way to town. Appellant was some distance in front. Without waiting for his grandmother he crossed the road. While doing so, he was hit by a car driven by 1st respondent/1st defendant. He was taken to the Miri General Hospital and discharged on December 9, 1974. On admission, he was examined and found to sustain (a) multiple abrasions on the face, dorsum of right hand and left shin; (b) fracture of mandible left side; and (c) fracture of left tibia and fibula.

On his discharge from hospital appellant continued to receive treatment at the outpatient clinic. On April 11, 1975 the plaster of Paris on his injured leg was removed. Dr. Pathak who treated him examined him in 1977 and found no shortening of the injured leg and also no disability of any kind. Dr. Choo Sing Liong treated appellant for the fracture of the mandible. He said for the first fifteen days appellant could not open his mouth and had to be fed with fluid or semi-fluid diet. He removed the wire from appellant on December 16, 1974. Although appellant could open his mouth he could not take solid food until more than two weeks after the removal of the wire. During the wiring period appellant could not

speak and must be feeling uncomfortable. At the initial stage he was clearly in pain. After his last examination of appellant in 1977, Dr. Choo found that the injuries had left appellant with three disabilities, namely, (i) a scar about 3 inches on left mandible; (ii) asymmetry of lower jaw — the midline shifted several millimetres to the right; and (iii) loss of central occlusion. In future he would find chewing food uncomfortable. As to loss of occlusion, his lower teeth would shift to the right side. Should he lose his teeth as he gets older there might be difficulty in making his denture. The learned judge awarded appellant general damages \$2,500, special damages \$190. No interest was given and costs were fixed at \$750. Appellant appealed.

In support of the contention that the general damages were too low, various cases were cited to show the damages awarded in respect of separate injuries. These injuries were sustained in the same accident. It is not right to assess the damages separately and then add them up at the end as in such cases there is bound to be an element of overlapping. Thus, in *Mahammad bin Mahammad Said & Anor. v. Perianayagam & Anor.*⁽¹⁾ Suffian F.J., as he then was, said: —

"The items are not separate heads of compensation. They are only aids at arriving at a fair and reasonable compensation... There is an element of overlapping when two or more injuries are suffered simultaneously."

Although the learned judge was satisfied that appellant had suffered pain and inconvenience, he considered that as appellant was only a child the human body would adjust itself to these discomforts. He took the view that the pain and sorrows of childhood were transient and, therefore, of less weight than in the case of an adult. He found the grandmother to be negligent in allowing appellant to cross the road. He said he would not hesitate in finding appellant guilty of contributory negligence if appellant was an adult or a young person. As an infant, appellant would not be guilty of contributory negligence. With respect, there is no indication to show that in assessing general damages the learned judge was influenced by all these. Had the learned judge given more weight to the disabilities arising out of the fracture of the mandible we are sure he would have awarded a more liberal sum.

To arrive at a fair composite figure it may be necessary to look at comparable cases and to bear in mind what Lord Morris said in *Jag Singh v. Toong Fong Omnibus Co. Ltd.*⁽²⁾ at page 465 of the three considerations: —

"(1) That the law as to the factors which must be weighed and taken into account in assessing damages is in general the same as the law in England. (2) That the principles governing and defining the approach of an appellate court that is invited to hold that damages should be increased or reduced are the same as those of the law in England. (3) That to the extent to which regard should be had to the range of awards in other cases which are comparable such cases should as a rule be those which have been determined in the same jurisdiction or in a neighbouring locality where similar social economic and industrial conditions exist."

In *Mohamed bin Ahmad Suleimanie v. Gim Guan Co. Ltd.*⁽³⁾ plaintiff, aged 22 years, suffered from depressed fracture of left zygoma, compound fracture

and dislocation of the right ankle and cracked right frontal bone. He walks with a slight limp and has lost full range of movements in the joint. He tires easily when walking long distances and finds difficulty walking on rough ground. The dislocation of the mandibular cartilage not only interferes with his mastication but also makes a clicking noise when opening or shutting his mouth. Further, arthritis is likely to develop. Buttrose J. awarded him general damages of \$10,000 (\$7,000 for fractured jaw and \$3,000 for ankle).

The plaintiff in *M. Alagappan s/o Muthuraman v. The Government of the Republic of Singapore & Anor.*⁽⁴⁾ sustained fracture of mandible and fracture dislocation of the distal end of the right radius and cerebral concussion. There was no residual disability as far as the jaw was concerned. He was awarded general damages of \$10,000 (\$7,000 for the jaw and \$3,000 for the wrist).

A female telephone operator aged 22 years in *Saniah & Ors. v. Abdul Hamid & Ors.*⁽⁵⁾ sustained fracture of the jaw and other injuries. There was no disability resulting from the injuries. However, she suffered from ptosis of the right eye. MacIntyre J., as he then was, awarded her general damages of \$8,500. In *Kepong Mines Ltd. & Anor. v. Chee Sing Kau*⁽⁶⁾ plaintiff sustained fracture of the mandible, contusion of the bladder with rupture of the tip of the urethra, loss of two molar teeth and a lacerated wound in the left thigh. He was awarded \$10,000 general damages. The court dismissed the appeal on quantum.

Having regard to the nature of the injuries, the disabilities, the trend of awards in comparable cases, and taking into consideration various factors the award of \$2,500 was inordinately low. We consider a fair and reasonable sum should be \$8,000. Accordingly, we allowed the appeal by increasing the general damages to \$8,000 with interest at 6% per annum from the date of service of the writ to date of payment. Costs to be taxed to appellant both here and the court below. Deposit to be refunded to appellant. The money due to appellant is to be deposited with the Public Trustee to be used for his benefit until he attains majority.

Appeal allowed.

Solicitors: *M.S. Sandhu & Co.; Ho & Co.*

TONG LEE HUA v. YONG KAH CHIN

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Chang Min Tat F.J.J.) November 6 and 27, 1978]

[Kuala Lumpur — Federal Court Civil Appeal No. 83 of 1978]

Practice and Procedure — Summary judgment — No defence on merits — Option for purchase of land — Brokerage — R.S.C. 1957, O. 14.

Contract — Option relating to sale of land — Claim for brokerage commission.

The respondent claimed brokerage commission for successfully putting through the sale of land to the appellant. The respondent applied for summary judgment but the appellant opposed it on the ground *inter alia* that the sale did not come about through the brokerage of the respondent. Both the Senior Assistant Registrar and the judge on appeal considered that the appellant had shown no defence on merits and had not raised a triable issue. The appellant appealed.

Held, dismissing the appeal: on the facts the respondent was the broker who had brought about the sale and was entitled to the commission.

HIGH COURT.

K. Thayalan for the plaintiff.

G.T. Rajan for the defendant.

Cur. Adv. Vult.

Vohrah J.: This is an appeal by the defendant against the decision of the Senior Assistant Registrar granting leave to the plaintiff to sign final judgment against him in the sum of \$95,062.50 plus interest and costs under Order 14 of the Rules of the Supreme Court, 1957.

The facts leading to the action out of which this appeal has arisen are as follows. The defendant wished to purchase certain lands held under E.M.R. Nos. 8292, 4367, 4366, 4365, 4369, 6851 and 1230 for Lots 737, 738, 742, 741, 745, 5927 and 746 respectively, all in the Mukim of Klang (hereinafter referred to as "the land"). Negotiations for the purchase of the land were conducted through the plaintiff who on November 4, 1975 obtained an option in writing in his favour for the sale of land at the price of \$65,000 per acre purportedly valid for five days from that date signed by Yong Yoke Lin and Chong You (f). On November 6, 1975 the plaintiff executed a sub-option in favour of the defendant or his nominee(s) for the sale of this land operative for the same period at the same price. On the same date the defendant gave the plaintiff a written undertaking to pay the plaintiff a commission of 6½% of the total purchase price of the land upon the successful conclusion of the sale of the land to him or his nominee(s). In the event the land was sold to the defendant's wife and nominee, Chong Mui Lan, for the sum of \$1,462,500. Subsequently, defendant having refused to pay, the plaintiff filed this action for the recovery of his commission of 6½% of this sum amounting to \$92,062.50. In a nutshell, the defendant claimed in his defence that the sale did not take place as a result of the exercise of the option or sub-option both of which he claimed were defective and that accordingly they could not have been exercised. Hence he was not liable to the plaintiff.

It is commonplace that an application for summary judgment under Order 14 can be successfully resisted by a defendant if he manages to raise a *bona*